Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

RAFAEL ANTONIO FURCAL-PEGUERO,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Georgia

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Georgia State judiciary's interpretation of the legislative intent in enacting 40-6-392(a)(3), as interpreted via 40-5-55(b), is consistent with its obligation to avoid arbitrary and disparate treatment of non-English speaking citizens of the State of Georgia, thus through its erroneous interpretation deprives non-English speaking citizens of the constitutional guarantee of due process and equal protection.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Georgia.

OPINIONS BELOW

The Georgia Court of Appeals rendered its opinion in this matter on May 21, 2002 and is reported at 255 Ga.App. 729, 566 S.E.2d 320, (2002) (App. A, *infra*, App. 1-App. 10). The order of the State Court of Cobb County is unreported.

JURISDICTION

The Supreme Court of Georgia denied the writ of certiorari on September 6, 2002 and denied the motion for reconsideration on September 27, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

28 U.S.C. § 2403(b) may apply and notification served on the Attorney General of the State of Georgia pursuant to Rule 29.4(c) has been made.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment

The Fourteenth Amendment

28 U.S.C. § 1257(a)

28 U.S.C. § 2403(b)

Ga. Const., Art. 1, §1, Para. I

Ga. Const., Art. 1, §1, Para. II

O.C.G.A. § 40-5-55(b)

O.C.G.A. § 40-5-67.1

O.C.G.A. § 40-6-391(a)(1)

O.C.G.A. § 40-6-392(a)(3)

STATEMENT OF THE CASE

At issue in this Petition for Certiorari is the single question: Do police officers who are arresting a person who is incapable of communicating in English have ANY duty to communicate his implied consent rights in his native tongue by way of a readily available telephonic translation service for which the police subscribe and use on an "as needed" basis?

Petitioner is of Hispanic descent and is a non-English speaking United States citizen. On June 10, 2000, Mr. Furcal-Peguero did operate a motor vehicle on Floyd Road, within Cobb County, Georgia. Cobb County police were called to a Kroger store parking lot in Mableton, Georgia by a concerned citizen who reported his suspicion that Mr. Furcal-Peguero may have stolen the automobile he was driving, a 1995 Mercedes. The caller also reported that the vehicle had a dealer drive-out tag, and was leaking fluid from beneath the vehicle. The caller to the Cobb County police communicated no allegation of possible impaired driving by Mr. Furcal-Peguero during this initial telephone call.

Upon their arrival, Sgt. A.M. Marchetta, Officer W. T. DeSaussure and Officer P. Geuze of the Cobb County police discovered Mr. Furcal-Peguero standing outside the vehicle. The Cobb County police also discovered that Mr. Furcal-Peguero, who was 19 years old at the time, possessed a valid Georgia driver's license.

A puddle of fluid (engine oil from a damaged oil pan) had accumulated from the underside of the Mercedes, and a fluid trail led back out to the adjacent street. However, the automobile was not running when the police arrived. Upon further investigation, the Cobb County police concluded that the vehicle was not stolen, and instead, was rightfully in Mr. Furcal-Peguero's possession.

Because the investigating officers noticed symptoms that were possibly indicative of alcohol consumption, the officer investigated Mr. Furcal-Peguero for driving under the influence. During the investigation, the arresting officer was able to determine that Mr. Furcal-Peguero spoke broken English, and that English was his second language. Mr. Furcal-Peguero's performance on the field tests revealed indications that he could not fully comprehend the instructions of how to perform the evaluations, as given to him in English. Following the administration of field evaluations, Sgt. Marchetta advised Mr. Furcal-Peguero of the implied consent rights in English under O.C.G.A. §§ 40-5-55 and 40-5-67.1. The advisement takes one to two minutes to read in its entirety.

The arresting officer read Mr. Furcal-Peguero the implied consent rights at the Kroger parking lot after Mr. Furcal-Peguero was placed under arrest. The arresting officer read the rights only in English and only one time. Furthermore, the officer made no effort to obtain a Spanish

translation. Mr. Furcal-Peguero neither asked for nor was offered a translator. Mr. Furcal-Peguero ultimately did take the State's breath test.

The Georgia driver's license examination is offered to non-English speaking applicants in the native language of that person. Mr. Furcal-Peguero's first and "native language" is Spanish. Mr. Furcal-Peguero is a native of the Dominican Republic.

For approximately 10 years prior to Mr. Furcal-Peguero's arrest, Cobb County had subscribed to and made available to all of its employees (including Cobb County police officers) the services of "Language Line," an international language translation service which is accessible to subscribers and their employees via telephone by merely dialing a toll free number, providing the customer account number and requesting translation of one of over 140 languages. The service, which costs the County approximately $2.00 per minute of actual use, was available and readily accessible to the Cobb County police on the evening of June 10, 2000, and this fact was known to all three Cobb County police officers who investigated the call pertaining to Mr. Furcal-Peguero. Telephones were readily available either from use of cell phones at the scene, the pay phones at Kroger or via the business phones inside the Kroger store. Furthermore, Mr. Furcal-Peguero posed no safety threat to the three Cobb County police officers such that use of a telephone translation service would have been impractical.

A. Proceedings Below

The State and the Petitioner, Mr. Furcal-Peguero, agreed to a bench trial on a single count of DUI pursuant

to stipulated facts as outlined and aforementioned in the "Statement of the Case" section. It was the intention of the parties, that if a conviction occurred, Mr. Furcal-Peguero would appeal the trial court's ruling on certain pre-trial motions related to the admissibility of Mr. Furcal-Peguero's blood alcohol level as determined by the State administered chemical breath test.

In exchange for the case being tried on stipulated facts and without a jury, the State agreed to proceed only on count two of the accusation, per se DUI under O.C.G.A. § 40-6-391(a)(5). Before trial, the State nol prossed and dismissed all of the remaining counts of the accusation.

The trial court considered several legal challenges without hearing any testimony from any witnesses. Instead, the trial court based its ruling on the stipulated facts contained in a written motion signed by the parties and entitled "Stipulated Facts and Consent to Try Case as a Bench Trial." In the motion, the parties stipulated to the facts as being "controlling, complete and binding" in this case and the parties agreed, *inter alia*, that the breath test results were the *sine qua non* of the State's case against Mr. Furcal-Peguero for DUI under O.C.G.A. § 40-6-391(a)(5).

Furthermore, the parties agreed that at the time of his arrest in June of 2000, Mr. Furcal-Peguero had significant difficulty comprehending English (and especially complex terminology and concepts) and had significant difficulty speaking English fluently, and that his comprehension of English was so marginal that being permitted to hear the implied consent advisements in Spanish would have appreciably assisted him in understanding his legal rights, including his right to refuse to submit to a chemical

test under Georgia's implied consent law, his right to obtain independent tests, etc. In other words, while Mr. Furcal-Peguero could comprehend some basic words in English, his meaningful understanding of his options and obligations under Georgia's implied consent would have been significantly enhanced by being able to hear the implied consent advisements in Spanish, before having to decide whether to submit to the breath test. It was also stipulated that at the time of Mr. Furcal-Peguero's arrest, Cobb County had subscribed to the Language Line service to implement the use of interpreters when needed.

Additionally, the trial court considered several legal challenges to the admissibility of Mr. Furcal-Peguero's blood alcohol level as determined by the State administered chemical breath test. The parties stipulated that the Appellant, Mr. Furcal-Peguero, has either raised in written form or by oral motion in limine (or, by alternative motion to suppress) each and every challenge as set forth in the motion entitled "Stipulated Facts and Consent to Try Case as a Bench Trial." The State and the Appellant, Mr. Furcal-Peguero, agreed that the appellate courts should consider each basis or ground for challenge to be an independent legal argument by Defendant seeking the overturn of the ruling in ***State v. Tosar***, 180 Ga.App. 885, 350 S.E.2d 811 (1986).

After considering the stipulated facts contained in the motion entitled "Stipulated Facts and Consent to Try Case as a Bench Trial" and the legal arguments of the parties, the trial court found the evidence of Mr. Furcal-Peguero's blood alcohol level admissible pursuant to the existing case authority in ***State v. Tosar***, 180 Ga.App. 885, 350 S.E.2d 811 (1986).

The trial court then found Mr. Furcal-Peguero guilty of count two of the accusation, per se DUI under O.C.G.A. § 40-6-391(a)(5). The trial court sentenced Mr. Furcal-Peguero to twenty-four (24) hours incarceration. Additionally, Mr. Furcal-Peguero was sentenced to the statutory minimum requirements for a first DUI conviction including, eleven (11) months and twenty-nine (29) days probation, and required him to complete a drug and alcohol evaluation and any recommended treatment, submit to random alcohol and drug testing, and complete forty (40) hours of community service.

Thereupon, a Notice of Appeal was filed on October 30, 2001. All State appellate procedures were exhausted and the Supreme Court of the State of Georgia denied Petitioner's Petition for a Writ of Certiorari via an order issued on September 6, 2002 as well as denying Petitioner's Motion for Reconsideration via an order dated September 27, 2002. Other than the license suspension, no conditions of his sentence, have been completed. Hence, Petitioner has standing to pursue this action on the grounds that not only has he suffered objective present harm, there is also the threat of specific future harm due to the potential for sweeping and improper applications of current Georgia law. ***U.S. Const. Amend XIV***. *See*, ***Bigelow v. Virginia***, 421 U.S. 809, 95 S.Ct. 2222 (1975); ***Gooding v. Wilson***, 405 U.S. 518, 92 S.Ct. 1103 (1972). *See also*, ***Campbell v. Louisiana***, 523 U.S. 392, 118 S.Ct. 1419 (1998); ***Adarand Constructors, Inc. v. Mineta***, 534 U.S. 103, 122 S.Ct. 511 (2001).

This Petition is properly and timely filed pursuant to U.S. Supreme Court Rule 13.

REASONS FOR GRANTING THE PETITION

I. Non-English speaking citizens can, in fact, "communicate", and are therefore on equal footing as all other citizens who can verbally communicate, therefore, to deny non-English speaking individuals the due process afforded to English speaking citizens on the basis that they cannot "communicate" denies them the equal protection of the laws afforded by the United States and Georgia Constitutions.

This case is subject to strict scrutiny review. ***Clark v. Jeter***, 486 U.S. 456, 108 S.Ct. 1910 (1988). Petitioner asks this Court to vindicate constitutional provisions designed to protect basic human rights. *See, e.g.,* ***Brown v. Board of Education,*** 347 U.S. 483, 74 S.Ct. 686 (1954). The constitutional provisions seeking to be vindicated are the rights to due process and equal protection of the laws that protect citizens' liberty interest and to not be deprived of that right without the due process of law. ***U.S. Const. Amend XIV.*** The term 'vested rights' means "interests which it is proper for the state to recognize and protect and of which the individual cannot be deprived arbitrarily without injustice". ***Recycle & Recover, Inc. v. Georgia Bd. of Natural Resources***, 266 Ga. 253, 466 S.E.2d 197 (1996). The Fifth Amendment to the United States Constitution guarantees to the States via the Fourteenth Amendment, that all individuals are entitled to due process before being deprived of the loss of liberty, as well as affording individuals the equal protection of the laws. Article 1, Section 1, Paragraph II of the Georgia Constitution (1983) also provides for the guarantee of equal protection of the laws.

The Due Process Clause of the U.S. Constitution requires that any deprivation of life, liberty or property be free from fundamental unfairness through governmental conduct that offends the community's sense of justice, decency and fair play. ***Moran v. Burbine***, 475 U.S. 412, 432-34, 106 S.Ct. 1135, 1146-48 (1986). Due process of law is a summarized constitutional guarantee of respect for those personal immunities that are rooted in the traditions and conscience of our people so as to be classified as "fundamental". ***Rochin v. California***, 342 U.S. 265, 169, 72 S.Ct. 205 (1952). Georgia's Due Process Clause, ***Art. 1, Sec. 1, Par. I,*** mirrors the language of the Due Process Clause of the Fifth and Fourteenth Amendments. Similar provisions of the Georgia Constitution have been said to afford *greater* due process protection than does the federal Due Process Clause. ***Suber v. Bulloch County Bd. Of Ed.***, 722 F.Supp. 736 (S.D.Ga. 1989) (emphasis added).

Violation of equal protection can be found where a state judiciary's erroneous interpretation of legislative intent in wording of a statute infringes on a fundamental right. *See,* ***Bush v. Gore***, 531 U.S. 98, 121 S.Ct. 525 (2000). The touchstone of due process is protection of the individual against arbitrary action of government. ***Wolff v. McDonnell,*** 418 U.S. 539, 94 S.Ct. 2963 (1974). ***Mathews v. Eldridge***, 424 U.S. 319, 96 S.Ct. 893 (1976) developed the concept of "flexible due process" which requires a three-part test to determine how much process is due. The court must evaluate: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, *including the function involved and the*

fiscal and administrative burden that the additional or substitute procedural requirement would entail. . . . ***Id.*** (emphasis added).

In the instant matter, the judicial interpretation at issue pertains to that in the opinion of ***State v. Tosar***, 180 Ga.App. 885, 350 S.E.2d 811 (1986), a case where a non-English speaking defendant submitted to a State administered breath test after having been read his implied consent warnings. The trial court granted the defendant's motion to suppress because the State did not meet the burden of showing that the defendant was informed of his implied consent rights. ***Id.*** The Court of Appeals reversed and concluded that a non-English speaking defendant *is the same as an unconscious perso*n and that the inability of such an individual to communicate with the investigating officer results in the State administered test being admissible under O.C.G.A. § 40-6-392(a)(3). ***Id.*** (emphasis added). The inability to obtain an additional test should not preclude admission of the State administered test. ***Id.*** The Court of Appeals also declined to compel the State to read or seek to obtain translation of the implied consent advisements in any language but English. ***Id.*** Of significance is the basis of the ***Tosar*** reasoning which states:

> Pursuant to O.C.G.A. 40-5-55(b) "[a]ny person who is dead, unconscious, or otherwise in a condition rendering him incapable of refusal shall be deemed not to have withdrawn the [implied consent to a chemical test to determine the alcohol or drug content of his blood] and the test or tests may be administered, subject to Code Section 40-6-392." Thus, the General Assembly recognized that there could be instances in which the suspect driver might be incapable of comprehending his rights when read to him. Obviously appellee

> was not dead or unconscious when he submitted to the intoximeter test. The State argues, however, that because of his inability to understand the officer who spoke only English, appellee falls into the category of "otherwise incapable of refusal." This contention has merit where the statute is read to mean that the inability to understand the rights read in English rendered the non-English speaking appellee's condition "the same as unconscious, i.e., in a noncommunicative condition." ***Id.***

Pursuant to Georgia law, the initial rule of statutory construction is to look to the legislative intent and to construe statutes to effectuate that intent. O.C.G.A. § 1-3-1(a). ***State v. Perkins***, ___ Ga.App. ___, ___ S.E.2d ___, 2002 WL 1492238 (2002). In construing a legislative act, a court must first look to the literal meaning of the act. ***Telecom USA, Inc. v. Collins***, 260 Ga. 362, 393 S.E.2d 235 (1990). If the language is plain and does not lead to any absurd or impracticable consequences, the court simply construes it according to its terms and conducts no further inquiry. ***Diefenderfer v. Pierce***, 260 Ga. 426, 396 S.E.2d 227 (1990). Further, statutes are to be construed in accordance with their real intent and meaning and not so strictly as to defeat their legislative purpose, ***Johnson v. Housing Auth. of Atlanta***, 198 Ga.App. 816, 403 S.E.2d 97 (1991), and statutory construction "must square with common sense and sound reasoning." ***Tuten v. City of Brunswick***, 262 Ga. 399, 418 S.E.2d 367 (1992).

The basic reading of the court's analysis in ***Tosar*** and its application in subsequent cases, is that it was the legislative intent to deny non-English speaking citizens a basic fundamental right. There is nothing in the legislative history that even remotely suggests a basis for this

holding. The interpretation by the judiciary is intentionally and blatantly discriminatory. The Georgia judiciary has refused to provide guidelines where if it cannot be ascertained whether or not an individual suspect can speak English, then the officer must at least *attempt* to find a translator or provide an interpreter. Non-English speaking citizens are in fact similarly situated to all citizens who can "communicate" whether it is in English, Spanish, French, sign language, etc., or otherwise. Albeit, the " . . . or otherwise in a condition rendering him incapable of refusal . . . " provision, when construed and read in context with the "dead, unconscious" provisions of the statute can be taken to mean that the legislature was only referring to the *physical conditions* of impairment that would render someone non-communicative or the simple *refusal* to speak by someone who is otherwise able to communicate. Not the status of the person in relation to the dialect spoken.

The Court of Appeals' statement in ***Tosar*** that it was not "basing its holding today upon 40-5-55(b)" is merely legal pretext. The Court basically engaged in an entire paragraph of analytical reasoning based on the fact that according to 40-5-55(b) as an example to justify its holding and then skirts the issue through a legal loophole. The ***Tosar*** opinion has basically reduced non-English speaking individuals to second class citizens

Moreover, just recently in ***Padron v. State***, 254 Ga.App. 265, 562 S.E.2d 244 (2002), the Georgia Court of Appeals reversed the conviction of two non-English speaking defendants because the state failed to establish that defendants understood the officer's request (at the roadway location of a traffic stop) to search the vehicle, and thus failed to establish that consent to search was freely

and voluntarily given. The court took note of the fact that *despite the availability* of departmental consent to search waiver forms printed in Spanish, the deputy did not opt to use one. ***Id.*** (emphasis added).

Only after arresting the defendants did the officer in ***Padron*** become concerned about their difficulty in understanding English, and he radioed ahead for an interpreter. ***Id.*** The ***Padron*** case evidences the fact that the Court recognizes that non-English speaking individuals can, in fact, communicate. This holding is in direct conflict with its holding in ***State v. Tosar***, 180 Ga.App. 885, 350 S.E.2d 811 (1986).

Furthermore, the ***Padron v. State***, 254 Ga.App. 265, 562 S.E.2d 244 (2002) case establishes that, by implication, if procedures and means exist for a police agency to translate advisements to non-English speaking individuals, via interpreters or written materials in an individual's primary language, then *there is a legal obligation to at least seek to utilize those resources*. Therefore, it is evident that in the instant matter the Georgia Supreme Court erroneously affirmed Petitioner's conviction on the basis of the ***State v. Tosar***, 180 Ga.App. 885, 350 S.E.2d 811 (1986) decision, a case in which Language Line's instant availability was not an issue.

With regards to analyzing the logistics of instituting a process to afford translation services, the Georgia Supreme court in ***Rodriguez v. State***, 275 Ga. 283, 565 S.E.2d 458 (2002), stated: "The logistics of such a requirement would be extremely problematic in a society as pluralistic and diverse as the United States." To the contrary, the fact that Georgia and the United States is a diverse society is *exactly* why non-English speaking

citizens should be afforded at least the *opportunity*, if and when available, to be able to have the implied consent warnings read to them in a language they can understand. Again, with the advent of technology and the implementation of Language Line, such services make the "severe administrative costs" argument to justify the denial of due process a waning argument.

Here, the State's failure to provide an interpreter for the Petitioner violated the equal protection clauses of both the United States and the Georgia Constitutions because non-English speaking criminal defendants are similarly situated to those defendants who can "communicate" verbally in English or any other spoken dialect.[1]

It is clear from the record that Petitioner could not understand enough English to be able to communicate effectively with the officer. Furthermore, at the time that Petitioner was arrested and read the implied consent notice, it was clear that the Petitioner could not have

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[1] Indeed, although the legislature in O.C.G.A. § 50-3-100(a) has adopted English as the official language of the State, it further provides:

> (b) This Code section shall *not be construed in any way to deny a person's rights under the Constitution of Georgia or the Constitution of the United States or any laws, statutes, or regulations of the United States or of the State of Georgia as a result of that person's inability to communicate in the official language*;
>
> (d) The provisions of subsection (a) of this Code section shall not apply: (1) When in conflict with federal law;
>
> (2) When ... *justice* require[s] the use of other languages....

[emphasis added]

made a voluntary, intelligent and knowing decision on whether or not to take the State administered chemical test, to refuse the State administered chemical test or to request an additional, independent chemical test from qualified personnel of his own choosing, because there was no qualified person to translate the meaning of the notice for him in Spanish.

The State had the Language Line service immediately available, and could have easily provided Petitioner with a qualified interpreter. The officer was fully aware of the availability of the service, yet made no effort to utilize it. The five-sentence implied consent notice could have easily been interpreted at minimal effort and cost. The Petitioner should have had the equal protection of the law, and the denial of such also violated his right to due process of the law.

II. The Georgia judiciary's erroneous interpretation has the residual effect of discriminating on the basis of national origin.

The judiciary's erroneous interpretation does discriminate on the basis of national origin because those who cannot speak English or the spoken language are usually those of foreign descent. ***Sandoval v. Hagan***, 197 F.3d 484 (C.A. 11 Ala. 1999) *rev'd on other grounds* in ***Alexander v. Sandoval***, 532 U.S. 275, 121 S.Ct. 1511 (2001). However, the substance of the holding in ***Sandoval v. Hagan***, 197 F.3d 484 (C.A. 11 Ala. 1999) remains intact. Pursuant both ***Sandoval*** cases, Section 601 of Title VI of the Civil Rights Act of 1964 provides that no person shall, "on the ground of race, color, or national origin be excluded from participation in, *be denied the benefits of*, or be subjected to discrimination under any program or activity"

covered by Title VI. (emphasis added). The ***Sandoval*** court stated:

> Although the court looks to the policy's effect rather than solely to its terms, the court's finding that the English-only policy has an unjustified disparate impact on the basis of national origin is bolstered by the multitude of cases that find a strong nexus between language and national origin. Although no court has explicitly held that language is a proxy for national origin, in the equal protection context, the Supreme Court has recognized that language may serve as an adjunct for an immutable characteristic: 'It may well be, for certain ethnic groups and in some communities, that proficiency in a particular language, like skin color, should be treated as a surrogate for race under an equal protection analysis.' ***Sandoval v. Hagan,*** 7 F.Supp.2d 1234 (1998) *rev'd on other grounds, quoting* ***Hernandes v. New York***, 500 U.S. 352, 371-72, 111 S.Ct. 1859 (1991).

Non-English speaking citizens are equal to English speaking citizens with regard to the ability to communicate and therefore fall within the "zone of interests" sought to be protected by Title VI. *See, e.g.,* ***Maryland State Conference of NAACP Branches v. Maryland Department of State Police***, 72 F.Supp.2d 560 (1999). By denying access to a qualified interpreter when available, the State is engaged in purposeful discrimination against non-English speaking citizens, thus discriminating on the basis of national origin. An English speaking citizen who is travelling abroad in a foreign country whose primary language is not English, is no less able to communicate than the rest of the citizens of that country. There is just a perceived language barrier.

Although, providing interpreter services across the country for defendants who may speak hundreds of different languages seems a hopelessly costly proposition for the American justice system due to the increase of the number of non-English speaking immigrants, this is not the case in Georgia as the Language Service is readily available and has in fact been authorized for use in judicial proceedings.[2]

In ***Tosar***, the court stated, "The State argues, however, that because of his inability to understand the officer who spoke only English, appellee falls into the category of 'otherwise incapable of refusal'. This contention has merit where the statute is read to mean that the inability to understand the rights read in English rendered the non-English speaking appellee's condition 'the same as unconscious, i.e., in a noncommunicative condition'." Quoting ***Smith v. State***, 143 Ga.App. 347, 238 S.E.2d 698 (1977). However in ***Tosar***, there was nothing in the record to show if appellee ever communicated to the officer that he could not speak English. Whereas here, during the investigation, the arresting officer was able to determine that Mr. Furcal-Peguero spoke broken English, and that English was his second language. Mr. Furcal-Peguero's performance on the field tests revealed indications that he could not fully comprehend the instructions of how to perform the evaluations, as given to him in English.

The view expressed in ***Tosar***, is exactly analogous to the conditions of human plight that were fought to be

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[2] *See* Georgia Magistrate Court Rule 14. Language Line Service which provides, "The . . . Language Line Service is authorized for use in the magistrate courts whenever interpreting is needed in criminal and civil proceedings". [Adopted effective November 30, 1995.]

avoided as noted in ***Brown v. Board of Education***, i.e., the "exemption from legal discriminations, implying inferiority in civil society, lessening the security of [African-Americans] enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race." Moreover, at the time ***Tosar*** was decided, *more than fifteen (15) years ago*, the issue was whether the State *should be compelled to print the implied consent rights* in Spanish or in as many different languages as the Georgia driver's license examination is given. (emphasis added). The Georgia Court of Appeals stated:

> To do so, we believe, would unreasonably burden law enforcement officers who would then be required to determine if the non-English speaking person spoke one of the languages of the pre-selected printed forms as well as determining if that person spoke one of the languages of the pre-selected printed forms as well as determining if that person could also read his spoken language. This we will not do. ***State v. Tosar***, 180 Ga.App. 885, 350 S.E.2d 811 (1986).

However, this is no longer the case. Language Line *is* readily available and *was* readily available and instituted for use by the Cobb County Police Department. Life is not stagnant and neither should the law be, but should bend and yield to the ever changing needs of society and its citizens. *See, e.g.* ***Brown v. Board of Education***, 347 U.S. 483, 74 S.Ct. 686 (1954) (court would consider public education in light of its full development and present status throughout the nation, and not in light of conditions prevailing at time of adoption of the amendment). The implementation of the Language Line Service is not

burdensome or cost prohibitive as it is already instituted and widely used.

Also, because of the readily available services of Language Line, the reasoning in ***Tosar*** that there will be some danger in the deterioration of evidence because of the time consumed to try to obtain adequate interpretation services is also an obsolete concept:

> . . . [A]lcohol is assimilated into the bloodstream, reaching its cumulative peak concentration shortly after ingestion of the latest drink, and thence, without further ingestion, commences to dissipate from the blood at a constant and fairly rapid rate. The police investigator is often faced with the problem of preserving evidence of a crime which he believes upon reasonable grounds to have been committed . . .

This reasoning is obsolete because there would be no danger in the potential loss of evidence since the time it would take to call Language Line and have them read the two minute advisement in a language a suspect understands does not present an exigent circumstance warranting the denial of due process for a procedure which would take less than five minutes.

To establish national origin discrimination under Title VI, plaintiff must prove that he or she is member of ethnic minority, that he or she was denied participation in federally funded program because of his or her national origin, and that he or she is otherwise qualified to receive the benefit allegedly denied him or her. ***Atakpa v. Perimeter OB-GYN Associates, P.C.***, 912 F. Supp. 1566 (N.D. Ga. 1994). Having a language barrier is quite different from the ability to communicate/being non-communicative. Since Cobb County has implemented and

authorized the use of Language Line, Petitioner contends that he has been "denied the benefits of" a program covered by Title VI. If the Cobb County Department of Public Safety has implemented a program using Federal Government Funds for the use of the Language Line, however, do not require the use of that service in instances where 1) the suspect in question is attempting, but is unable to communicate with the officer in English, but speaks another non-English dialect and would benefit from the use of an interpreter; and 2) the police officer(s) is actually aware that it can be easily utilized, then the implementation of the program is a mere pretext to try to establish that it intends to advance constitutional guarantees and does not discriminate on the basis of national origin.

The United States is a nation that boasts of providing the greatest safeguards to personal liberties than any other country in the world. Non-English Speaking citizens have the same "legitimate expectations" of due process and equal protection guarantees as other citizens, as well they should. To allow the denial of the most fundamental principle of due process to citizens whose cultural background and/or national origin precludes English as their primary language, is to forget the most basic fundamental principles for which this nation was founded. The law cannot be static or inflexible, and when necessary should bend with the growth of the times and the availability and accessibility to programs, technology, etc., which protect and advance the most basic concepts of the Constitution. This is a time honored notion and was aptly stated by this Honorable Court in ***Hurtado v. People of State of Cal.***, 110 U.S. 516, 4 S.Ct. 111 (1884):

> Flexibility and capacity for growth and adaptation is the peculiar boast and excellence of the

common law . . . The constitution of the United States was ordained, it is true, by descendants of Englishmen, who inherited the traditions of English law and history; *but it was made for an undefined and expanding future, and for a people gathered and to be gathered from many nations and of many tongues. . . .* ***Id.*** (emphasis added).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Court of Appeals of Georgia.
FURCAL-PEGUERO
v.
The STATE.
No. A02A0792.
May 21, 2002.
Reconsideration Denied June 12, 2002.
Certiorari Denied Sept. 6, 2002.

Defendant was convicted following bench trial on stipulated facts, in the State Court, Cobb County, McDuff, J., of driving under the influence (DUI). Defendant appealed. The Court of Appeals, Ellington, J., held that Spanish-speaking defendant consented to chemical intoxication tests administered by state. Affirmed.

ELLINGTON, Judge.

Following a bench trial on stipulated facts, the State Court of Cobb County convicted Rafael Antonio Furcal-Peguero of driving under the influence, O.C.G.A. § 40-6-391(a)(5). Furcal appeals, contending the trial court erred in denying his motion to suppress the result of a breath test. Finding no error, we affirm.

Before trial, the parties agreed that the arresting officer read Furcal the implied consent notice only in English, despite knowing that Furcal's native language was Spanish and that a telephonic translation service was immediately available. Furcal moved to suppress the result of the State-administered breath test on the basis that the implied consent notice was not conveyed to him as

required by law.[1] At trial, Furcal conceded the issue is controlled adversely to him by *State v. Tosar*, 180 Ga.App. 885, 888, 350 S.E. 2d 811 (1986), in which we held that the implied consent notice does not have to be translated into Spanish for a Spanish-speaking person. Furcal argued, however, that *State v. Tosar* should be overruled as unconstitutional or modified to address situations in which translation services are instantly available to the arresting officer. Reserving his challenge to the evidence of his blood alcohol concentration, Furcal stipulated to certain facts, including that he was driving with an unlawful blood alcohol level,[2] and submitted his case to the trial court for decision. The court found Furcal guilty, implicitly denying his motion to suppress under *State v. Tosar*.

Although the trial court and the parties characterized the proceeding below as a bench trial on stipulated facts, we are concerned that in many material respects the court and the parties considered the proceeding a conditional guilty plea, designed to preserve for appeal Furcal's legal challenge to *State v. Tosar*, 180 Ga.App. at 888, 350 S.E.

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[1] O.C.G.A. §§ 40-5-55(a)(consent to chemical test of blood, breath, or urine implied by act of driving a motor vehicle); 40-5-67.1(b) (script for implied consent notice); 40-6-392(a)(3) (right to independent test), (a)(4) (requirement that driver be advised of right to an independent test at time of arrest).

[2] When Furcal was arrested on June 10, 2000, a per se DUI violation under O.C.G.A. 40-6-391(a)(5) was defined as driving while having a blood alcohol concentration of 0.10 grams or more. See Ga. L. 1991, pp. 1886, 1891, 1896, § 6 (legal limit set at 0.10 for offenses after April 24, 1991); Ga. L. 2001, pp. 208, 214, 229, § 1-5 (legal limit reduced to 0.08 for offenses after July 1, 2001). The challenged breath test showed Furcal was driving with a blood alcohol concentration of 0.111 grams.

2d 811.[3] In *Hooten v. State*, 212 Ga.App. 770, 775(1), 442 S.E.2d 836(1994), we overruled *Mims v. State*, 201 Ga.App. 277, 279, 410 S.E. 2d 824 (1991), and disallowed the conditional guilty plea procedure. See *Barber v. State*, 231 Ga.App. 176(2), 498 S.E.2d 758 (1998); *Martin v. State*, 214 Ga.App. 388, 448 S.E. 2d 57 (1994). Ordinarily, a defendant waives any error in the denial of his motion to suppress by pleading guilty; therefore, viewing Furcal's conviction as arising from a guilty plea would preclude this Court from reviewing the denial of his motion to suppress. *Thompson v. State*, 240 Ga.App. 539, 540(2), 524 S.E.2d 239 (2000).

But Furcal expressly proceeded to trial on stipulated facts under the authority of *Richards v. State*, 269 Ga. 483, 500 S.E. 2d 581 (1998). Under *Richards v. State*, a defendant may stipulate to facts that would be demonstrated at trial (such as the result of a breath test) and may

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[3] For example, Furcal's attorney asked his client, "You understand you are entering a plea on one count of DUI? . . . Do you understand there is going to be a plea and from the plea we are going to appeal?" The defense attorney stated that he and the prosecutor worked for months on structuring the agreement. The State agreed to recommend a particular sentence and to enter nolle prosequi as to four other counts. See O.C.G.A. § 17-8-3. After hearing the parties' stipulated facts, the trial court asked, "Then I suppose with this stipulation it is agreed by the parties that the Court should find [Furcal] guilty and sentence him. Is that contemplated between the parties?" The defense attorney responded, "I think *[State v.] Tosar* compels you to do so, until it is overturned, doesn't it." After finding Furcal guilty, the trial court said, "[s]ince this is a bench trial on stipulated facts, it is recognized by the Court that the parties are stancing [sic] their case so that the Court of Appeals can have a fresh look at . . . *[State v.] Tosar*" The court then stated that it "accept[ed] [Furcal's] plea as freely[,] voluntarily and understandably entered."

acknowledge that the stipulated facts would support a conviction of the crime charged *on the condition* that he may challenge specified pretrial rulings on appeal (such as the denial of his motion to suppress the result of the breath test). *Id.* at 485-486, 500 S.E.2d 581. This procedure is particularly appropriate in this case, where the trial court was not required to resolve *any* disputed facts in ruling on the pretrial issues. *Cf. id* at 483-484, 500 S.E.2d 581 (trial court was required to resolve disputed facts regarding reading of implied consent notice in denying motion to suppress). Thus, based on *Richards v. State* we consider Furcal's legal challenge on the merits. We urge trial courts, however, not to blur the important distinctions between accepting a guilty plea and finding a defendant guilty following a bench trial.

Where the evidence is uncontroverted and no question regarding the credibility of witnesses is presented, we review de novo the trial court's application of the law to undisputed facts. *Vansant v. State*, 264 Ga. 319, 320(1), 443 S.E.2d 474(1994). In five related enumerations, Furcal contends the trial court erred in allowing the evidence of his blood alcohol level, based on the following circumstances to which the State stipulated: (1) Furcal's native language is Spanish and his command of English is marginal; (2) Furcal carried a valid Georgia driver's license; (3) the State administers the driver's test to nonEnglish-speaking applicants in the native language of the applicant; (4) the arresting officer read the implied consent notice to Furcal only in English; (5) as a Cobb County employee, the arresting officer had telephonic access to translation services; (6) knowing Furcal was a Spanish speaker and knowing that a telephonic translation service was immediately available, the arresting

officer failed to have a translator relay the implied consent notice to Furcal in Spanish; (7) Furcal's ability to understand that he could refuse the breath test, that evidence of his refusal could be used against him, and that he had a right to an independent test would have been significantly greater if the implied consent notice had been read to him in Spanish; and (8) Furcal agreed to take a breath test. It is also undisputed that Furcal did not request a translator; nor did he request an independent test.

The General Assembly has declared as a matter of law that persons having an illegal blood alcohol concentration "*constitute*[ ] *a direct and immediate threat to the welfare and safety of the general public.*" (Emphasis supplied.) O.C.G.A. § 40-5-55(a). "Under the implied consent laws, every driver is deemed to have given his consent to a chemical test for alcohol content, subject only to the duty placed upon an officer to advise the testee that he is entitled to an independent test of his own choosing. Once that duty is fulfilled by the officer, the statutory obligation is satisfied." (Citations and punctuation omitted.) *State v. Webb*, 212 Ga.App. 872, 873, 443 S.E.2d 630 (1994). See O.C.G.A. § 40-5-55(a).[4] 40-5-67.1(b). O.C.G.A. § 40-5-67.1(b) requires the arresting officer to inform the person

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[4] O.C.G.A. § 40-5-55(a) provides in pertinent part:

> [A]ny person who operates a motor vehicle upon the highways or elsewhere throughout this state shall be deemed to have given consent, subject to Code Section 40-6-392, to a chemical test or tests of his or her blood, breath, urine, or other bodily substances for the purpose of determining the presence of alcohol or any other drug, if arrested for [DUI] or if such person is involved in any traffic accident resulting in serious injuries or fatalities.

who has been arrested of his right to an independent test and to inform him that his refusal to submit to State testing may be offered into evidence against him at trial. "O.C.G.A. § 40-5-67.1 thus allows the person to withdraw his implied consent by refusing to submit to testing." *Hernandez v. State*, 238 Ga.App.796, 798,(2), 520 S.E. 2d 698 (1999). O.C.G.A. § 40-5-55(b). provides that any person who is "dead, unconscious, or otherwise in a condition rendering such person incapable of refusal shall be deemed not to have withdrawn" his implied consent, thereby allowing the test or tests to be administered.

Furcal contends, inter alia, that *State v. Tosar* should be overruled or modified because nonEnglish-speaking drivers are denied equal protection of the law in comparison to hearing impaired drivers. O.C.G.A. § 24-9-100 et seq., requires police officers to request the assistance of a translator before interrogating a hearing impaired arrestee.[5] A written interrogation may proceed if a translator

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[5] In particular, O.C.G.A. § 24-9-103 provides:

(a) The arresting law enforcement agency shall provide a qualified interpreter to any hearing impaired person whenever the hearing impaired person is taken into custody for allegedly violating any criminal law or ordinance of the state or any political subdivision thereof.

(b) (1) Except as provided in paragraph (2) of this subsection, the law enforcement agency shall immediately request a qualified interpreter from the department, and the department shall provide a qualified interpreter. No interrogation, warning, informing of rights, taking of statements, or other investigatory procedures shall be undertaken until a qualified interpreter has been provided; and no answer, statement, admission, or other evidence acquired from the hearing impaired person shall be admissible in any criminal or quasi-criminal proceeding unless such was knowingly

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is not available within an hour. O.C.G.A. § 24-9-103(b)(2). This mandatory requirement extends to DUI arrests. See *Allen v. State*, 218 Ga. App. 844, 846-847, 463 S.E. 2d 522 (1995)(admission of result of State-administered test reversed due to officer's failure to request a qualified interpreter for a hearing impaired driver); *State v. Woody*, 215 Ga. App. 448, 450, 449 S.E.2d 615 (1994)(exclusion of result of State-administered test due to officer's failure to request a qualified interpreter for a hearing impaired driver affirmed).

While Georgia law requires a limited accommodation for this immutable physical disability, "a hearing impaired driver does not have greater rights and privileges than a hearing driver." *State v. Webb*, 212 Ga.App. at 873-874, 443 S.E.2d 630. "[T]he laws requiring the presence of a qualified interpreter do not vitiate [the] implied consent" of a hearing impaired driver arrested for DUI. (Punctuation omitted.) *Id.* Because removing drunk drivers from our highways and roads is a critical public safety function, and because the level of alcohol or drugs in a person's blood, breath, or urine inevitably changes over time, police

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and voluntarily given through and in the presence of a qualified interpreter. No hearing impaired person who has been taken into custody and who is otherwise eligible for release shall be detained because of the unavailability of a qualified interpreter. (2) If a qualified interpreter is not available one hour after the hearing impaired person has been taken into custody and a request has been forwarded to the department, the arresting officer may interrogate or take a statement from such person, provided that such interrogation and answers thereto shall be in writing and shall be preserved and turned over to the court in the event such person is tried for the alleged offense.

officers must be able to initiate the evidence collection process without unreasonable delay. See O.C.G.A. §§ 40-5-55(a); 40-5-67.1; *State v. Tosar*, 180 Ga.App. at 888, 350 S.E. 2d 811; *Smith v. State*, 143 Ga.App. 347, 349(1), 238 S.E.2d 698 (1977). As we emphasized in *State v. Webb* and in *State v. Tosar, all* drivers are entitled only to be *advised* of their rights under the implied consent law, that is, to have the implied consent notice read to them. *State v. Webb*, 212 Ga.App. at 873-874, 443 S.E. 2d 630; *State v. Tosar*, 180 Ga.App. at 888, 350 S.E. 2d 811. See *Snelling v. State*, 176 Ga. App. 192, 193(1), 335 S.E. 2d 475 (1985)(officer's testimony that he advised the driver of his implied consent rights is prima facie evidence of compliance). The law does not require the arresting officer to ensure that the driver *understands* the implied consent notice.[6] *State v. Webb*, 212 Ga.App. at 873-874, 443 S.E.2d 630; *State v. Tosar*, 180 Ga. App. at 888, 350 S.E.2d 811.

The result of the State-administered test is admissible in this case because Furcal consented to chemical intoxication tests by driving on Georgia's roads, because the officer properly advised Furcal of his implied consent rights, and because Furcal did not withdraw his consent. O.C.G.A. § 40-5-55(a); 40-5-67.1; 40-6-392; *Snelling v. State*, 176

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[6] Furcal contends the trial court erred in finding that he "knowingly waived his right to additional testing" under O.C.G.A. § 40-6-392. The trial court, however, did *not* find that Furcal knowingly waived his right to additional testing. Further, the admissibility of a State-administered test is not conditioned on the State's showing of a knowing and intelligent waiver of the "right" to an independent test. *Cunningham v. State*, 255 Ga. 35, 38(6), 334 S.E.2d 656 (1985); *State v. Webb*, 212 Ga.App. at 873, 874-875, 443 S.E.2d 630; *State v. Tosar*, 180 Ga.App. at 887, 350 S.E.2d 811; *Snelling v. State*, 176 Ga.App. at 193-194(1), 335 S.E.2d 475.

Ga.App. at 193(1), 335 S.E.2d 475. See also *State v. Webb*, 212 Ga.App. at 873, 443 S.E. 2d 630; *State v. Tosar*, 180 Ga.App. at 888, 350 S.E.2d 811.[7] The trial court did not err

[7] We note that in *State v. Tosar*, we accepted the State's argument that a nonEnglish-speaking driver is "noncommunicative," that is, "the same as unconscious," but we declined to base our holding that the State-administered test was admissible on O.C.G.A. § 40-5-55(b). 180 Ga.App. at 887, 350 S.E.2d 811. We reaffirm today (and agree with Furcal) that a nonEnglish-speaking driver is *not* "in a condition rendering such person incapable of refusal" for the purposes of O.C.G.A. § 40-5-55(b). See also *State v. Webb*, 212 Ga.App. at 874, 443 S.E. 2d 630(hearing impaired driver's inability to understand the officer did not constitute a withdrawal of his implied consent). This is an important distinction because, under O.C.G.A. § 40-5-55(b), a law enforcement officer is not required to advise a dead or unconscious driver, or a similarly noncommunicative driver, of his rights under the implied consent law before administering chemical tests. *Smith v. State*, 143 Ga.App. at 349(1), 238 S.E.2d 698(semi-conscious and noncommunicative). To the greatest extent possible, every driver suspected of DUI should be given the opportunity to exercise the choice of withdrawing his consent to testing (and suffering the evidentiary consequences) or submitting to the test and requesting an independent test. Requiring law enforcement officers to read the implied consent notice in English to every conscious driver, even those seemingly incapable of understanding spoken English, may seem like a hollow formality, but it is not. Suppose an officer believes an apparently nonEnglish-speaking driver would not be able to understand the implied consent notice and so forgoes giving the notice. The driver might later claim he could have understood the notice and, if given the notice, he would have withdrawn his consent or requested an independent test. Requiring law enforcement officers to read the implied consent notice in English to every conscious driver relieves those officers of the unreasonable burden of evaluating a driver's communication ability before testing his breath or blood.

We wish to clarify one aspect of *State v. Tosar*. In *State v. Tosar* we stated that the driver's "inability to communicate with the officer brings this case within the meaning of O.C.G.A. § 40-6-392(a)(3) . . . . Where the law enforcement officer cannot communicate with the suspect because the suspect cannot speak English, any failure to obtain an additional test is justifiable and the results of the state-administered

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in admitting the result of the State-administered breath test.

Judgment affirmed.

SMITH, P.J., and *ELDRIDGE*, J., concur.

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tests are admissible." 180 Ga.App. at 888, 350 S.E. 2d 811. As we noted in *Nelson v. State*, 135 Ga.App. 212, 213, 217 S.E. 2d 450(1975); however, "the state's justifiable failure or inability to obtain the additional test must logically be preceded by the [driver's] request for same." (Punctuation omitted.) See also *Smith v. State*, 250 Ga.App. 583, 586(1), 552 S.E.2d 528(2001); *State v. Vandervoort*, 215 Ga.App. 72, 73(1), 449 S.E. 2d 617(1994); *State v. Buffingon*, 189 Ga.App. 800,801-802, 377 S.E.2d 548(1989). Because Furcal did not request an independent test, O.C.G.A. 40-6-392(a)(3) has no application to the analysis of whether the result of the State-administered test is admissible.

APPENDIX B

SUPREME COURT OF THE STATE OF GEORGIA

CLERK'S OFFICE

ATLANTA

DATE: September 06, 2002

William C. Head
750 Hammond Drive
Building 5
Atlanta GA 30328

Case No. S02C1523

RAFAEL ANTONIO FURCAL-PEGUERO v. THE STATE

COURT OF APPEALS CASE NO. A02A0792

The Supreme Court today denied the petition for certiorari in this case.

All the Justices concur.

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_____

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_____

Sherie M. Welch, Clerk

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APPENDIX C

SUPREME COURT OF GEORGIA

Case No. S02C1523 Atlanta, September 27, 2002

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

RAFAEL ANTONIO FURCAL-PEGUERO v. THE STATE

Upon consideration of the Motion for Reconsideration filed in this case it is so ordered that it be hereby denied.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I hereby certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ Sherie M. Welch, Clerk

APPENDIX D

Fifth Amendment to the Constitution of The United States (in relevant part):

> "No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."

Fourteenth Amendment to the Constitution of The United States (in relevant part):

> "No State shall make or enforce any law which shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws . . ."

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28 U.S.C. § 1257(a):

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

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28 U.S.C. § 2403(b):

> In any action, suit, or proceeding in a court of the United States to which a State or any

agency, officer, or employee thereof is not a party, wherein the constitutionality of any statute of that State affecting the public interest is drawn in question, the court shall certify such fact to the attorney general of the State, and shall permit the State to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. The State shall, subject to the applicable provisions of law, have all the rights of a party and be subject to all liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality.

Ga. Const., Art. 1, §1, Para. I:

No person shall be deprived of life, liberty, or property except by due process of law.

Ga. Const., Art. 1, §1, Para. II:

Protection to person and property is the paramount duty of government and shall be impartial and complete. No person shall be denied the equal protection of the laws.

O.C.G.A. § 40-5-55 Implied consent to chemical tests:

(a) The State of Georgia considers that any person who drives or is in actual physical control of any moving vehicle in violation of any provision of *Code Section 40-6-391* constitutes a direct and immediate threat to the welfare and safety of the general public. Therefore, any person who operates a motor vehicle upon the highways or else-

where throughout this state shall be deemed to have given consent, subject to Code Section 40-6-392, to a chemical test or tests of his or her blood, breath, urine, or other bodily substances for the purpose of determining the presence of alcohol or any other drug, if arrested for any offense arising out of acts alleged to have been committed in violation of *Code Section 40-6-391* or if such person is involved in any traffic accident resulting in serious injuries or fatalities. The test or tests shall be administered at the request of a law enforcement officer having reasonable grounds to believe that the person has been driving or was in actual physical control of a moving motor vehicle upon the highways or elsewhere throughout this state in violation of *Code Section 40-6-391*. The test or tests shall be administered as soon as possible to any person who operates a motor vehicle upon the highways or elsewhere throughout this state who is involved in any traffic accident resulting in serious injuries or fatalities. Subject to *Code Section 40-6-392*, the requesting law enforcement officer shall designate which of the test or tests shall be administered, provided a blood test with drug screen may be administered to any person operating a motor vehicle involved in a traffic accident resulting in serious injuries or fatalities.

(b) Any person who is dead, unconscious, or otherwise in a condition rendering such person incapable of refusal shall be deemed not to have withdrawn the consent provided by subsection (a) of this Code section, and the test or tests may be administered, subject to Code Section *40-60-392*.

(c) As used in this Code section, the term "traffic accident resulting in serious injuries or

fatalities" means any motor vehicle accident in which a person was killed or in which one or more persons suffered a fractured bone, severe burns, disfigurement, dismemberment, partial or total loss of sight or hearing, or loss of consciousness.

40-6-392 Chemical tests for alcohol or drugs in blood:

(a) Upon the trial of any civil or criminal action or proceeding arising out of acts alleged to have been committed by any person in violation of *Code Section 40-6-391*, evidence of the amount of alcohol or drug in a person's blood, urine, breath, or other bodily substance at the alleged time, as determined by a chemical analysis of the person's blood, urine, breath, or other bodily substance shall be admissible. Where such a chemical test is made, the following provisions shall apply: . . . (3) The person tested may have a physician or a qualified technician, chemist, registered nurse, or other qualified person of his own choosing administer a chemical test or tests in addition to any administered at the direction of a law enforcement officer. The justifiable failure or inability to obtain an additional test shall not preclude the admission of evidence relating to the test or tests taken at the direction of a law enforcement officer;

Code of Georgia, Title 40, Chapter 5, Article 3:

40-5-67.1(b)(2) Implied consent notice for suspects age 21 or over:

Georgia law requires you to submit to state administered chemical tests of your

blood, breath, urine, or other bodily substances for the purpose of determining if you are under the influence of alcohol or drugs. If you refuse this testing, your Georgia driver's license or privilege to drive on the highways of this state will be suspended for a minimum period of one year. Your refusal to submit to the required testing may be offered into evidence against you at trial. If you submit to testing and the results indicate an alcohol concentration of 0.10 grams or more, your Georgia driver's license or privilege to drive on the highways of this state may be suspended for a minimum period of one year. After first submitting to the required state tests, you are entitled to additional chemical tests of your blood, breath, urine, or other bodily substances at your own expense and from qualified personnel of your own choosing. Will you submit to the state administered chemical tests of your (designate which tests) under the implied consent law?

Code of Georgia, Title 40, Chapter 6, Article 15:

40-6-391(a) A person shall not drive or be in actual physical control of any moving vehicle while:

(1) Under the influence of alcohol to the extent that it is less safe for the person to drive;

. . .

(5) The person's alcohol concentration is 0.08 grams or more at any time within three hours after such driving or being in actual physical control from alcohol consumed before such

driving or being in actual physical control ended . . .